92-1673

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

IN THE MATTER OF:
CHRIS J. ROY
Debtor

CHRIS J. ROY
Petitioner

v.

CAMILLE F. GRAVEL, JR.
and
RICHARD V. BURNES
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Is the debt of Chris J. Roy to Camille F. Gravel, Jr. and Richard V. Burnes non-dischargeable under 11 U.S.C. Section 523 because it arose by virtue of a defalcation by the bankrupt while acting in a fiduciary capacity [Section 523(a)(4)]?

What is the applicable standard for determining what constitutes "defalcation while acting in a fiduciary capacity" for purposes of dischargeability under 11 U.S.C. Section 523?

Is the debt of Chris J. Roy to Camille F. gravel, Jr. and Richard V. Burnes non-dischargeable under 11 U.S.C. Section 523 because it arose by virtue of a willful and malicious injury by Chris J. Roy to another person or the property of another person [Section 523(a)(6)]?

PARTIES INVOLVED

Pursuant to Supreme Court Rule 21, the parties involved in the proceedings before the United States Court of Appeals for the Fifth Circuit were and are the following:

Chris J. Roy
Petitioner
711 Washington Street
Alexandria, Louisiana 71309

Camille F. Gravel, Jr.
Respondent
2001 McArthur Drive
Alexandria, Louisiana 71307-6118

Richard V. Burnes
Respondent
711 Washington Street
Alexandria, Louisiana 71309

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is unpublished as noted at 983 F.2d 1062 (5th Cir.1993), but the opinion is provided in the Appendix of this Petition. The opinions of the United States District

Court for the Western District of Louisiana and of the United States Bankruptcy Court for the Western District of Louisiana are unreported and are also provided in the Appendix.

STATEMENT OF JURISDICTION

A Writ of Certiorari is sought to review the decision of the United States Court of Appeals for the Fifth Circuit dated and entered January 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254(1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Section 727(b) of Title 11 of the United States Code provides as follows:

"(b) Except as provided in Section 523 of this Title, a discharge under sub-section (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this Chapter,..."

Section 523 of Title 11 of the United States Code (Exceptions to Discharge) provides in part as follows:

"(a) A discharge under Section 727...of this Title does not discharge an individual debtor from any debt - -

...(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

...(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;..."

STATEMENT OF THE CASE

For a period of some years, Camille Gravel, Jr. (hereafter "Gravel"), Chris J. Roy (hereafter "Roy") and Richard V. Burnes (hereafter "Burnes") practiced law together pursuant to an oral partnership in a firm known as Gravel, Roy and Burnes. Basically the partnership agreement was that of all net monies which the firm made, of the first $120,000 Gravel would get 50%, Roy would get 25% and Burnes would get 25%. All over $120,000 would be divided 40% to Gravel, 30% to Roy and 30% to Burnes.

In 1980, Roy gave notice that he wanted out of the partnership, Gravel, Roy & Burnes. The partners agreed on a termination date of January 19, 1980.

Thereafter, without notification to the clients who had contracted with the partnership, Gravel, Roy & Burnes, the parties entered into a contract (hereinafter sometimes referred to as the "Agreement") which described the way the parties would partially handle the disposition of certain of the former partnership assets, principally cases the former law firm of Gravel, Roy and Burnes handled for clients. Still, the former clients of Gravel, Roy & Burnes were not informed.

By 1982, Roy had discovered, through complaints by Burnes, that Gravel had not upheld his end of the Agreement. Roy then gave notice that he was withdrawing from the contractual Agreement. Pursuant to Article

XVI of the Agreement. He further gave notice to the clients whose cases he was handling that they should select their own lawyer. This was pursuant to Roy's understanding and interpretation that paragraph "D" of the Agreement permitted him to do so. It was also in accordance with the Code of Professional Responsibility. (See Article XVI, Rules of Professional Conduct, West, LSA Revised Statute, Vol. 21A, pp 161, et seq).

Most of the clients chose Roy and contingent fee agreements pursuant to Rule 1.5(c) were signed.

In 1984, Roy filed a Petition for Declaratory Judgment seeking to have the State Court interpret the Agreement.

Gravel and Burnes filed a reconventional demand seeking a money judgment against Roy

for monies which they alleged he obtained on settlement of cases (through the date of the State court trial) which were not paid to them in accordance with the Agreement.

Four years later, the case was tried and the state court trial judge rendered judgment on October 7, 1988 in favor of Gravel and Burnes declaring that the Agreement was a binding contract between the parties, was not an inadvertent partnership agreement, and granting judgment to Gravel and Burnes for monies owed by Roy to them for cases and clients who had terminated Gravel, Roy & Burnes, the former partnership, and retained Roy, individually. The judgment further reserved the rights of all parties to seek liquidation of the partnership and to require an accounting.

The case was appealed to the Louisiana Third Circuit Court of Appeals which

affirmed the trial court's decision. Roy v. Gravel, et al, 570 So. 2d 1175 (La.App. 3d Cir. 1990).

Writs of Certiorari or Review to the Louisiana Supreme Court were ultimately denied. Roy v. Gravel, et al, 573 So. 2d 1118 (La 1991).

Following the exhaustion of state court proceedings, because of the enormity of the trial court judgment, Roy filed a Chapter 11 bankruptcy proceeding which was later converted to a Chapter 7 proceeding.

In the Chapter 7 bankruptcy proceeding, Gravel and Burnes brought an adversary action seeking to have the debt reflected in the Judgment of the 9th Judicial District Court in and for Rapides Parish, Louisiana, as affirmed by the Third Circuit Court of Appeal of the State of Louisiana, declared non-dischargeable. (See pp. 1a, 1a Appendix)

On July 2, 1991, the Bankruptcy Judge rendered judgment declaring that the indebtedness to Gravel and Burnes as represented by the 9th Judicial District Court judgment was nondischargeable under the provisions of both 11 U.S.C. Section 523(a)(4) and (a)(6).

An appeal of the bankruptcy court judgment was taken to the United States District Court. On April 30, 1992, judgment was rendered by the Honorable F. A. Little, Jr., United States District Judge, affirming the decision of the Bankruptcy Court Judge.

On January 19, 1993, the United States Fifth Circuit Court of Appeals affirmed the United States District Court decision in a per curiam opinion.

REASONS FOR GRANTING THE WRIT

Petitioner seeks the granting of the Writ of Certiorari for two reasons: the

United States Courts of Appeals are not uniform in their application of the requirements for determining dischargeability under 11 U.S.C. Section 523(a)(4); this case points out the problems created for a lawyer who must abide by the Rules of Professional Conduct which under Louisiana law, have the force and effect of substantive law. Succession of Cloud, 530 So. 2d 1146 (La. Sup. Ct. 1988) and as a result incur a debt which is nondischargeable by the Bankruptcy Court.

(a) On the issue of whether the indebtedness of Roy to Gravel and Burnes is non-dischargeable under 11 U.S.C. Section 523(a)(4), peticioner argues that Chris J. Roy was not a fiduciary and was not considered a fiduciary, either by himself or by the state courts. In addition, the

standard for determining defalcations is not clear among the lower courts. Does it require that the debtor must have had the intent to violate a known duty, or not? Roy argues that he never knew of the duty he is alleged to have violated. His duty was to his clients as provided by the Rules of Professional Conduct.

(b) On the issue of whether the debt of Roy to Gravel and Burnes is nondischargeable pursuant to the provisions of 11 U.S.C. Section 523(a)(6), petitioner argues that the actions of Roy were not malicious; therefore not falling within the purview of Section 523(a)(6). In fact, he requested in writing that Gravel & Burns join with him in disclosing to clients of the former partnership, Gravel, Roy & Burns, of their rights to select any of them or any other lawyer to

continue their representation. Gravel and Burnes refused.

(A) DEFALCATION OF A FIDUCIARY

Section 523 of the Code provides as follows:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(4) for fraud or defalcation while acting in a fiduciary capacity,...;

or (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;..."

Let us first consider the issue of whether there was evidence in this case of a "defalcation [by Chris J. Roy] while acting in a fiduciary capacity".

Two questions must be answered in determining if there was a defalcation by

Chris Roy in his capacity as a fiduciary. First, was Chris Roy a fiduciary to Gravel & Burns within the meaning of Section 523 of the Bankruptcy Code? Second, was there a defalcation by Chris Roy while in his capacity as a fiduciary to Gravel and Burnes?

With regards the first question, namely was Chris Roy a fiduciary within the meaning of Section 523 of the Bankruptcy Act, it is submitted that Chris Roy was not a fiduciary. The determination of whether a person is a "fiduciary" for purposes of Section 523 is a question of federal law. State law must be considered, however, to determine whether a trust relationship exists such as to cause there to be a fiduciary relationship. In Re Angelle, 610 F. 2d 1335 (5th Cir. 1980).

It is true that under Louisiana law, partners are fiduciaries to the partnership and their partners. Louisiana Civil Code Article 2809. However, in the instant case, the partnership terminated on January 19, 1980. At the termination date, the fiduciary relationship ceased. The "comments" under Article 2809 of the Civil Code state as follows:

> "This fiduciary duty continues until the partnership is finally liquidated. This places the partner in a similar relationship to the partnership that a director holds to a corporation and its shareholders."

At first blush, the "comments" seem to buttress the position of the judgment holders in this case. On closer examination, however, it appears that the two sentences quoted are conflicting. First, there is no authority, statutory or otherwise, for the

position that the fiduciary duty of a lawyer/partner to represent clients for the partnership or former partners continues until the partnership is finally liquidated, once the client has discharged the partnership and retained the lawyer/partner to represent him. Second, if a partner's fiduciary duty to the partnership is like unto a director of a corporation, once the corporation is declared dissolved or files for liquidation (even if the liquidation is not complete), the duty of the director to the corporation ceases. To hold otherwise would prohibit a director from going into the same or a similar business as the liquidating corporation.

The bankruptcy judge, after reviewing the applicable jurisprudence, recognized that if state law does not support a

fiduciary duty to the claimants, the debt is dischargeable. See Reasons for Decision, page 9. Also see Matter of McCraney, 63 B.R. 64 (Bkrtcy. N.D. Ala. 1986). Plaintiffs in the adversary action would have the court believe that a partner, after the partnership is terminated, is a trustee over partnership assets for all purposes. The alleged authority for such is Ragsdale v. Haller, 780 F. 2d 794 (9th Cir. 1986). The Ragsdale case, however, holds that California law makes partners trustees over partnership assets for all purposes. 780 F. 2d 794 at 796. Louisiana law does not impose such a standard. It is undisputed that Roy was a partner in the original partnership of Gravel, Roy & Burnes. However, with the termination of the partnership, the Agreement entered into between the former

partners was simply a contractual one which required each party to
be obligated to the original partnership for the payment of certain monies from the completion of cases. This Agreement supplanted the former fiduciary relationship and constituted a simple obligation to pay. No implied trust was created to cause a fiduciary relationship to exist among the signatories to the agreement. The State Trial Court found as much and held that the Agreement did not create an inadvertent partnership. See Reasons for Judgment and Judgment of state trial court (See pp. 2a of Appendix).

Alternatively, the plaintiffs in this dischargeability action would also have the Court believe that Chris Roy was a fiduciary as a result of his assumption of the role of

liquidator under the Agreement. The State Trial Court did not determine that Chris Roy had the role of liquidator. It reserved to all parties the right to seek a liquidation of the former partnership and, as stated above, held that the Agreement did not constitute an inadvertent partnership. (See Judgment of state trial court at pp. 2a of Appendix).

Evidence of the fact that even Chris Roy did not consider any fiduciary relationship to exist is the fact that he kept all of the checks which were forwarded to him by Camille Gravel and Richard Burnes from 1982 until he turned them over to the Trustee in 1990. His testimony at the hearing on dischargeability was that he did not consider the checks to be owned by him, but to belong to Gravel and Burnes; they were never cashed.

Additional evidence of the fact that a fiduciary relationship did not exist is the fact that Chris Roy did not have exclusive control of the cases which he was to complete. According to the Agreement, and as confirmed in the testimony of Camille Gravel at the dischargeability hearing, Camille Gravel and Richard Burnes maintained their right to approve any settlements and any fee reductions on any and all cases which Chris Roy was permitted to handle.

If the Court makes the determination that the obligations of the parties to the contractual agreement were fiduciary in nature, then the logical extension of that would be that any obligation to pay money pursuant to a contract would not be dischargeable. All monetary debts would therefore be non-dischargeable. Such was

not and never has been the intent of the Bankruptcy Code.

The lower courts went to great lengths to find that the case of Carey Lumber Company vs. Bell, 615 F.2d 370 (5th Cir. 1980) stands for the proposition that on questions of dischargeability, the debtor is charged with knowledge of any duty which he owes to his creditor. See Bankruptcy Court Judge's Reasons for Decision, pp. 7, 8, 14-15. A review of the Carey Lumber Company decision, however, reveals that the debtor in that case was only charged with knowledge of the duty which he owed to his creditor as a result of the imposition of a special state statute. See Carey Lumber Company vs. Bell, 615 F.2d 370 (5th Cir. 1980), at p. 374. The Carey Lumber Company vs. Bell case is therefore inapplicable to the instant

litigation inasmuch as the ultimate decision in that case turns upon the state statute imposed knowledge of duty. The Carey Lumber Company case is not a Louisiana case; it is an Oklahoma case. There is no similar statutory requirement in Louisiana law imposing knowledge of duty.

It is therefore submitted that Chris Roy was not a fiduciary, and was not considered a fiduciary by either himself or the State Court. His fiduciary obligations were to the clients who discharged Gravel, Roy & Burnes and retained him.

Even assuming arguendo that Chris Roy was a fiduciary, the next question to be answered is: Did Chris Roy commit a defalcation while performing in his capacity as a fiduciary?

The recent case of Matter of Moreno, 892 F. 2d 417 (5th Cir. 1990) apparently redefined the Fifth Circuit standard for defalcations, that being "willful neglect of duty, even if not accompanied by fraud or embezzlement." 892 F.2d at 421. This characterization of the standard for defalcations is apparently a departure from the traditional 5th Circuit approach to defalcation (at least under Section 17(a)(4) of the former Bankruptcy Act) which the Bankruptcy Judge notes traditionally has been that the debtor is charged with knowledge of the duty irrespective of scienter. See, e.g., Carey Lumber Company v. Bell, 615 F.2d 370 ((5th Cir. 1980). This new standard apparently requires intent to violate a known duty. Did Chris Roy intend to violate a known duty? It is submitted that he did not.

The Court of Appeals confirmed that the clients could discharge the partnership at any time--even after termination of the partnership. (See judgment of Louisiana Third Circuit Court of Appeals, pp. 1a of the Appendix). When the original partnership was discharged by the individual clients, Roy considered his duty to his former partners terminated relative to those cases. Thereafter, he notified the clients they must choose their attorney pursuant to the Rules of Professional Conduct. On those cases where the clients chose Roy, he paid to his former partners the Court cost advances of the former partnership only. The actions which the plaintiffs complain of all occurred after the discharge of the former partner- ship by the various clients. If Roy did not

consider that he had any duty to his former partners, how could he ever commit a willful neglect of that duty? His actions were willful, but were not performed as a conscious neglect of a known duty. Chris Roy could have only had the intent to violate a duty if he felt he was a fiduciary with a duty, which he did not. This is evidenced by his testimony and his conscious actions not to cash the checks of Gravel and Burnes, given to his Chapter 7 Trustee.

It is therefore submitted that Chris Roy was not a fiduciary and he did not commit a defalcation while acting in his capacity as a fiduciary.

The interesting, challenging and intertwined issue presented here is as follows: Roy follows the Rules of Professional Conduct in notifying the

clients of the law firm that the firm has been dissolved. Each client is given the opportunity to select counsel of his or her own choice. Now, with regards to those clients who chose Roy, the bankruptcy courts declare that Roy is a fiduciary to his former partners for work performed, not for the former partners nor for the former partnership, but for the new lawyer (himself) for the clients. Is this conscionable?

(B) WILLFUL AND MALICIOUS CONVERSION

With regards to the application of Section 523(a)(6), it has consistently been held that this provision relates to torts and not to contracts. See cases cited at 3 Collier on Bankruptcy Section 523.16, page 523-116 (15th Ed. 1991).

The tort which the plaintiffs allege is conversion. To be successful, the plaintiffs must prove that the injury to Gravel and Burnes or to the old partnership was willful and malicious. The record is clear that Roy thought that he was taking action in 1982 which was authorized by the Agreement and the Code of Professional Conduct namely having the clients choose their own lawyers and terminating the contract. His actions were certainly willful, but since they were based upon his understanding and belief that he was following the intent of the Agreement, those actions cannot be deemed to be malicious such as to have the conversion, if one, come under the provisions of Section 523 (a)(6). As indicated in Collier on Bankruptcy:

> "A claim founded on a mere technical conversion without conscious intent to violate the rights of another, and under mistake or misapprehension, is dischargeable."

3 Collier on Bankruptcy Section 523.16, page 523-123 (15th Ed. 1991).

The factual circumstances of this case are certainly different from those as set forth in Chrysler Credit Corp. v. Perry Chrysler Plymouth, 783 F.2d 480 (5th Cir. 1986). In that case, cited by the Bankruptcy Judge as controlling in the instant case, the debtor went to Las Vegas and gambled away money which was owed to Chrysler Credit Corporation for automobiles Chrysler floor-planned to him that he sold. He knew what he was doing and was aware that his actions were intentionally harmful to the creditor. That is not the case here. In the instant case, as stated above, Chris

Roy's actions were based upon his understanding and belief that he was following the intent of the Agreement and the mandates of his clients; therefore, those actions cannot be deemed to be malicious such as to have the conversion, if one, come under the provisions of Section 523 (a)(6).

It is therefore submitted that there was no evidence of any malicious conduct directed toward Gravel and Burnes. Therefore, there was no proof sufficient to satisfy the provisions of Section 523 (a)(6).

A bankruptcy court's conclusions of law are subject to plenary review on appeal and the findings of fact are adopted, unless clearly erroneous. In Re: Niland, 825 F.2d 801, 806 (5th Cir. 1987) (Quoting Wilson vs.

Huffman, 818 F.2d 1135, 1142 (5th Cir. 1987). "A finding of fact is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with definite and firm conviction that a mistake has been committed.'" id. "When a finding of fact is premised on an improper legal standard or a proper one improperly applied, that finding looses the insulation of the clearly erroneous rule." id.

It is submitted that in the instant case, the findings of fact by the trial court were erroneous; but, even further, the findings of the court were premised on the application of an improper legal standard. This Court is empowered to overturn the decision of the bankruptcy court, the district court and the Court of Appeal.

CONCLUSION

It is submitted that the lower courts erred in finding that the indebtedness owed by Chris Roy was non-dischargeable under 11 U.S.C. Section 523(a)(4) and (a)(6).

Because the results of the proper application of Section 523 of the Bankruptcy Code is of extreme importance in the administration of day-to-day bankruptcy practice, especially for lawyers, your petitioner respectfully requests that the Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served on Camille F. Gravel, Jr. at 2001 McArthur Drive, Alexandria, Louisiana 71307-6118, on Richard V. Burnes at 711 Washington Street, Alexandria, Louisiana 71309, and on their counsel of record, Charles S. Weems III and Randall L. Wilmore, P.O. Box 6118, Alexandria, Louisiana 71307-6118, all on the 17 day of April, 1993.

H. Marshall

H. GAYLE MARSHALL

SWORN TO AND SUBSCRIBED before me, Notary Public, on this the 17 day of April, 1993 at Lake Charles, Louisiana.

Kay Vaughan Cupper

NOTARY PUBLIC
My Commission
Expires With Death